The Rule of Law and the EU

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Necessity's Mixed Virtue

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The maintenance of the Rule of Law is a concern for all established polities. For a still emerging polity such as the EU, it has a more fluid and more dynamic significance. If we examine the various functions that the Rule of Law is capable of performing – regulatory, authorizing, instrumental, community-identifying and promotional – all of these hold significant potential in the EU context. At the same time, however, the EU's effective capacity to exploit that potential is highly precarious. This paper argues that the promise and the vulnerability of the Rule of Law in the supranational context are two side of the same coin. They spring from the same background political circumstances of limited and uncertain 'polity legitimacy.' The paper concludes nevertheless that, provided investment in the Rule of Law embraces an awareness of these difficulties and is suitably modest, it still has a vital role to play in the development of a legitimate supranational order.

1. Introduction

The preservation of the Rule of Law is a fundamental and abiding concern for all established polities. For a still emerging polity such as the EU, the relationship with the Rule of Law is more fluid and more dynamic. Put starkly, the untapped potential for the Rule of Law to make a positive difference – and not just for its absence to make a negative difference – is greater in the case of the EU than of most other contemporary polities, and in particular most states. At the same time, however, the EU's effective capacity to draw upon the various 'use-values' of the Rule of Law is highly precarious. What is more, the attraction and the vulnerability of the Rule of Law in the supranational context are two side of the same coin. They spring from some of the same sources – the same background political circumstances of limited and uncertain polity legitimacy – with ambivalent consequences for the long-term resilience and adaptability of the Rule of Law idea beyond its statist domicile.

The discussion that follows seeks to elaborate upon these propositions, and to suggest, in conclusion, that the potential of the Rule of Law need not be exhausted by the conditions of its initial emergence within and adaptation to the supranational arena. But first we should say something about matters of definition. The Rule of Law is a highly variegated and contested concept – perhaps even, as Jeremy Waldron suggests, drawing on familiar terminology, "an essentially contested concept."[1] Yet, as the present paper is primarily interested in the *social significance* of the Rule of Law in the supranational domain, this conceptual instability is less an analytical hurdle than a threshold insight. That it attracts a variety of candidate definitions and interpretations within and between quite diverse contexts of application, and that it generates contestation over these definitions, interpretations and applications, is itself an important social fact about the Rule of Law, and one that has a significant bearing upon its

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[1] J. Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21 *Law and Philosophy* 137-164.

overall use-value. This is not to suggest that we should be uninterested in the analytical question – in the ideal sense or highest justification of the Rule of Law as opposed to its social and political functions. Rather, it is to plead that since commitment to its proper purpose and best understanding is typically what the diverse and contested articulation of the Rule of Law purports to be *about*, then absent some objective and unchallengeable standard of judgement, we can best test the practical credentials of different understandings of the Rule of Law – their viability and efficacy in making a difference for the better – in the social contexts in which they are pursued and challenged.

2. The Many Functions of the Rule of Law

To think of the Rule of Law in terms of its widest range of social applications is to introduce a range of differences of meaning and emphasis, and of their complex interconnections, that are not always appreciated in the literature. We may think of the social and political use-value of the Rule of Law in any polity along five distinct but closely intertwined functional dimensions – regulation, authorization, instrumentalization, identification, and promotion. Let us look at each of these in turn, and then examine their application to the EU context.

By the *regulatory* dimension of the Rule of Law we refer to what most commentators understand as being its focal concern and core function. We are here concerned with the way in which the Rule of Law operates as a kind of meta-rule – a rule about the importance and priority of legal rules – for a polity. Of course (and this is key to the elusiveness and contestability of the Rule of Law) the basic idea of a meta-rule already carries a whiff of paradox, a circular sense of a justification that purports to possess, and must therefore justify for itself, the same (i.e. Rule-like) properties as the thing for which it provides higher and external justification (i.e. the Law). Again Waldron conveys this well when he says that the Rule of Law in this primary regulatory sense is a "solution-concept" rather than an "achievement-concept".[2] A solution-concept is one which is defined in terms of a problem which we identify as being important to solve, even though, as in the case of the paradoxical quality of a 'rule that (legal) rules should rule', we are not sure what that solution is or whether we can ever fully achieve it.

For Waldron, the focal concern of the Rule of Law considered as a solution-concept, from Aristotle, through Hobbes and Dicey to Hayek, is "*how can we make law rule*?"[3] And, indeed, the various particular regulatory aspirations which we tend to find collected under the Rule of Law – certainly when defined in a "narrow"[4] or "thin"[5] sense as a minimum over which we can all agree or at least over which there is significant overlapping consensus – invariably speak to this particular concern and how

[2] *Ibid* 158.
[3] *Ibid*.
[4] See e.g. M. Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy" (2001) 74 *Southern California Law Review* 1307, at 1313.
[5] B. Tamanaha, *On the Rule of Law* Cambridge: CUP, 2004) ch.7.

we might approximate a satisfactory answer. They speak, in other words, to the possibility of "*law being in charge* in a society"[6] in terms which contrast the Rule of Law favourably with the arbitrary[7] "rule of men".[8] The relevant cluster of regulatory aspirations – of approximate answers – includes the following; fairly generalized rule in a political community through law and the avoidance of large zones of non-law (either in theory or in practice) where other forms of domination prevail; a high degree of legal predictability through published and prospective laws; separation of the legislative and the adjudicative function; and general adherence to the principle that no-one, least of all the government of the day, is above and immune from the law.[9]

Alongside and closely associated with its question-begging conceptual form, the other distinctive characteristic of the Rule of Law in this core regulatory sense is its direct dependence upon a culture of support within the relevant society.[10] This may seem obvious and unremarkable, but it is worth pausing for a moment to ask why that is the case. Support for the Rule of Law, conceived of in normative or quasi-normative terms, does not work in the same way as support for 'normal' legal norms. Normal legal norms often benefit from something like a "double-institutionalization"[11] effect. Their support derives both from first-order agreement with their particular content, and in addition – or, perhaps more pertinently, where that specific, first-order support is lacking, in the alternative – from a second-order general preparedness to comply with the law *just because it is the law*. The Rule of Law knows no corresponding double-order imperative. Precisely because *its* particular, first-order normative concern is with the (typically second-order) matter of law being deserving of compliance *in general*, there is no further and even more general normative justification to which it can appeal. In other words, just because its claimed virtues are already pitched at the highest level of normative generality, for the Rule of Law to function effectively requires a high level of *specific* support, or at least acquiescence, within the background culture.

If we now turn to the *authorization* dimension, by this we mean the way in which the assertion or defence of the Rule of Law may serve an ideological purpose, tending to authorize a certain modality and structure of power, and so also to advantage those who are situated so as to benefit from that modality or structure of power. The Rule of Law clearly places a high priority on Rule *through* the modality of Law, as opposed to other modalities of power such as threat, economic incentive or appeal to first-order right reason. And in so doing, it may privilege those who claim to be practitioners of this

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[6] Waldron, above n1, 157.
[7] See e.g. R. Bellamy, *Political Citizenship: a republican Defence of the Constitutionality of Democracy* (Cambridge: CUP, 2007) ch.2.
[8] See Tamanaha above n5, ch.9.
[9] This list is adapted from Rosenfeld, above n4, 1313.
[10] See e.g. Tamanaha, above n5, ch1.
[11] P. Bohannan, 'The Differing Realms of the Law', in P. Bohannan (ed), *Law and Warfare: Studies in the Anthropology of Conflict*. (New York: Natural History Press, 1967) pp. 43–56.

modality of power, in particular judges, lawyers and bureaucrats. The Rule of Law clearly also lends authority to a structure of power that is configured in terms which promise to give full and faithful effect to its virtues. By this structure of power we primarily mean a 'legal system' comprising certain classic characteristics which indicate its maturity and secure its autonomy against both internal and external challenge. These features include self-definition (through possession of its own rule of recognition and change), self-ordering (through an exhaustive *internal* hierarchy and unbroken chain of validity), self-extension (through the corresponding power to decide the *external* boundaries of its own jurisdiction), self-interpretation (through provision of its own authoritative judicial organ), self-enforcement (through procedural and adjectival rules implementing its substantive rules) and, crucially and consequentially, self-discipline (through the generation of a capacity for and expectation of auto-limitation – that those empowered by the system remain constrained in advance by the system and be not generally immune from its substantive norms).[12] And in affirming these various systemic features, the Rule of Law, conceived of in its authorization function, also validates the necessary or optimal institutional hardware of such a system – most notably an independent judiciary, but also whatever broader design principles (e.g. the separation of powers) are required to undergird the system.

Importantly, then, we can already discern a complex relationship between the regulatory and the authorization dimensions of the Rule of Law. The first is about the elusive pursuit of the ideal core of the notion of legality, while the second is about the institutionalization of certain law-centred claims to authority. These may be separately motivated activities, and need not complement one another. Yet there is also scope for overlap, and for the development of a symbiotic relationship between the two dimensions. On the one hand, the plausibility of the claim to authority of the overall legal system or order, and also of its *dramatis personae,* depends in some measure on whether that legal order is deemed to instantiate the regulatory virtues of the Rule of Law. On the other hand, these regulatory virtues cannot be adequately nourished in the absence of a fully-fledged legal system or order. The values of publicity and predictability and of general coverage by and accountability to law *presuppose* a legal order sufficiently complete and 'self-contained,'[13] and therefore sufficiently capable of self-discipline, to articulate the values to the requisite degree of intensity.

By the *instrumental* dimension of the Rule of Law we mean the way in which it may be understood as a means to the realization of other ends[14] rather than simply as a regulatory end and

[12] See further, N. Walker, 'European Constitutionalism in the State Constitutional Tradition' in J. Holder, C.O'Cinneide and C. Campbell-Holt (eds) 59 *Current Legal Problems (2006),* 51-89.

[13] To use the language of international law when referring to the autonomy from the general matrix of international law of particular functionally specialist legal regimes. see e.g. B. Simma and D. Pulkowski, "Of Planets and the Universe: Self-Contained Regimes in International Law" (2006) 17 ELIL 483-529.

[14] For a recent wide-ranging discussion of the modern growth of legal instrumentalism, see B. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge: CUP, 2006).

good in itself.[15] These extrinsic and instrumental benefits are in theory wide-ranging, but we may identify three clusters which have tended to predominate in the historical analysis of the instrumental benefits of the Rule of Law. In the first place, there is the idea that a settled, prospective and general framework of laws serves to protect the patterns of property rights and the predictability of exchange necessary to good commerce in general and capitalist commerce in particular. In the second place, there is the idea of a settled, prospective and general framework of laws as the crystallization and perfection of the will of 'The People' under a system of representative democracy. In the third place, and reflecting the post-substantive "procedural turn" in legal thought over the past 30 years, there is the idea of law as a set of decision-making rules that, in their reliably settled, prospective and general character, are capable of responding accurately, fairly and effectively to the growing variety of decisional spheres within society and the increasing diversity and complexity of interest and preference constituencies affected within and across each of these spheres.[16]

By the *identification* dimension we mean the way in which the Rule of Law may be claimed and portrayed as a defining virtue of a particular polity or political community, and one that may contribute to the sense of common attachment and commitment which permits and sustains its self-identification *as* a political community. Much of the recent discussion of "constitutional patriotism", for example, speaks precisely to the way in which certain general virtues of the just ordering of political relations associated with 'government according to law' may become a matter of common subscription and pride and, perhaps *in lieu* of certain traditional ties of affinity such as nation or ethnicity, a source of societal solidarity and political self-definition.[17]

By the *promotional* dimension, finally, we mean the way in which a polity may treat and benefit from the Rule of Law not only as a regulatory, authorizing, instrumental or identifying mechanism for its own internal purposes, but as something to be disseminated and applied elsewhere for any combination of these purposes. This may at first sight seem like a merely incidental feature of the Rule of Law, one neither closely related to nor belonging in the same category of importance as the first four. But that would be a mistake. In the first place, claims made in favour of the Rule of Law in its regulatory and authorization dimensions, and to some extent in its instrumental dimension, tend to be

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[15] Of course, the idea of the regulatory virtue of the Rule of Law as an end or good in itself does not rule out further discussion of the reasons why it may be considered a good in itself. There may be debate and disagreement over the more general values which the Rule of Law articulates, for example between freedom, human dignity and equality, and, indeed, over the optimal balance between these. Moreover, these differences tend to exacerbate the basic social conundrum, discussed in the main text, of seeking to invest a basic norm-authorizing norm with its own authority. Nevertheless, there remains an important difference between the relationship of *abstraction* between values pitched at different levels of generality on the one hand, and the *causal* relationship between means and ends on the other, and instrumentalism is concerned only with the latter.

[16] See, famously, J. Habermas, *Between Facts and Norms* (Boston: MIT Press; 1996, W. Rehg transl.); G. Teubner "Substantive and Reflexive Elements in Modern Law" (1983) *Law & Society Review* 239; P Nonet and P. Selznick, *Law and Society in Transition: Towards Responsive Law*, (New Brunswick: Transaction Publishers, 2001).

[17] See e.g. J. W Mueller, *Constitutional Patriotism* (New Jersey: Princeton Univ. Press, 2007).

universal in nature. It is often assumed or asserted that the good reasons for following the law in general in a particular society are *ipso facto* good reasons for following the law in general in *any* society, and should be promoted as such. This, indeed, lies behind the historical centrality of Rule of Law and related concerns in motivating, justifying or qualifying many types of formal international or transnational legal projects, agreements and transactions. In the second place, the high visibility and avowed seriousness of purpose of the promotional role has certain reputational consequences within the sponsoring polity as well. Like many forms of external action perpetrated in the name of a political community, it acts as a mirror to the question of identity and feeds into understandings about the nature of the sponsoring political community. More specifically, any promotional policy raises questions of consistency between internal and external constituencies and audiences over the approach taken by the sponsoring polity to the various dimensions of the Rule of Law.

3. The Allure of the EU Rule of Law

In the evolution of the EU, the Rule of Law has figured prominently, and increasingly so, within and across all five of these dimensions.

As regards its core regulatory function, we find both judicial and legislative support for the Rule of Law as a foundational value of the EU. Judicially, the language of the Rule of Law was vigorously asserted for the first time in the famous *Les Verts* case in 1986.[18] There, faced with the question of the reviewability of a decision on the allocation of elections funding made by the European Parliament, the European Court of Justice, in the name of a broad principle of judicial supervision, chose to extend the scope of reviewable acts beyond the institutions (i.e. Commission and Council) specified in the plain words of the then Article 173 EC[19] to embrace those of the European Parliament. In justifying such an extension, the Court claimed that the EU was "a Community based on the Rule of Law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic Constitutional Charter, the Treaty."[20] Not only, then, did this case engage directly with an important plank of the regulatory case, to the effect that all institutions of government of a legal order, including in this case the European Parliament, should conduct themselves in accordance with the rules of that legal order. But it also did so in highly charged language, using this occasion to apply the 'constitutional' label for the first time as an appropriate

[18] Case 294/83 *Les Verts* v *European Parliament* [1986] ECR 1339, and see further, N. Walker, 'Opening or Closure? The Constitutional Intimations of the ECJ' in M. Maduro and L. Azoulay (eds) *The ECJ after 50 Years* (Oxford: Hart, 2008).

[19] See now Art.230 EC, amended by the Treaty of Maastricht (1992) to provide for the explicit inclusion of the European Parliament as a reviewable institution.

[20] *Les Verts*, para. 23.

descriptor of the EU legal order.[21] Legislative recognition came later, but has also been significant. In the Treaty of Amsterdam of 1997 the Rule of Law was included for the first time amongst the principles on which the Union was founded,[22] with respect for it demanded of all prospective members[23] and a procedure introduced allowing for suspension of existing members in the event of its breach.[24] What is more, equivalent recognition of the Rule of Law was provided against the more vivid backdrop of the Constitutional Treaty of 2004,[25] just as it was, once again, in the Treaty of Lisbon[26] agreed in December 2007 (to replace the Constitutional Treaty following its ratification problems).

As regards the authorization function of the Rule of Law, the symbiotic element of its relationship with the core regulatory function repays close attention in the context of the EU. As summed up in the abiding popularity of the slogan – and mindset – of "integration through law,"[27] the idea of law as a primary medium or agent of supranationalism continues to provide a key theme in pro-European thinking. Partly this is about the particular instrumental functions of law, and of the Rule of Law, in the EU – to which we will shortly return. But partly, too, it is about the early and self-reinforcing ascendancy of 'the law', conceived of as an autonomously efficacious and virtuous structure and culture, in the dynamic of integration. This ascendancy, we should immediately make clear, has always been linked to the absence of other powerful media of integration. Indeed, in some respects the casual nexus between the presence of law and the absence of other media may be very tight. For example, in his well-known thesis on the "dual character of supranationalism,"[28] Joseph Weiler insisted that the early prominence of *legal* supranationalism and the intrepid contribution of the ECJ to this in its famously self-assertive 1960s jurisprudence on direct effect and supremacy,[29] would not have been possible unless *political* supranationalism remained largely undeveloped, with the Member States retaining key *de jure* or *de facto* veto powers in many areas of European policy-making until the 1987 Single European Act and beyond. As with law's instrumental virtue, the importance of the absence of alternative steering mechanisms in explaining law's centrality to integration is something to which we must return in due course.

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[21] See Walker, above n14.
[22] See Art. 6(1) TEU for general founding principles. For Common Foreign and Security Policy in particular, see Art. 11(1) TEU, and for development co-operation, see Art. 177(2) EC.
[23] Art. 49 TEU.
[24] Art. 7 TEU, as amended by the Treaty of Nice.
[25] See Preamble, Arts I-2, I-3(4), I-58(1), I-59, 111-292 CT (introducing the Rule of Law as a general principle guiding external action, and obviating the need for a specific provision in development co-operation).
[26] OJ 2007 C306/01.
[27] M. Cappelleti, M. Seccombe and J.H.H.Weiler *Integration Through Law* (Berlin: De Gruyter,1986).
[28] J.H.H. Weiler, "The Community System: The Dual Character of Supranationalism" (1981) *Yearbook of European Law* 267.
[29] Case 26/62 *Van Gend en Loos* v *Nederlandse Administratie der Belastingen,* [1963] ECR 1; Case 6/64 *Costa* v *ENEL* [1964] ECR 585.

But for now let us concentrate on the supposedly autonomous efficacy and virtue of the law. On this view, the judges and the legal professional become the custodians of the Rule of Law, and, crucially, the "new legal order" championed in the ECJ's early self-assertive jurisprudence and subsequently developed serves both as effect and cause in the symbiosis of authorization and regulation. That is to say, the accomplishment of a mature legal order is presented both as a realisation and vindication of the Rule of Law's autonomous context-independent and so context-invariant virtue, and as a necessary condition for the full expression of that virtue.

What is more, in the narrative of self-authorization in the name of the Rule of Law, it is striking that such authority is at least as likely be asserted *against* external as internal political forces. The *Les Verts* case may have concerned the legal subjection of an internal organ – the Parliament – but the other major pioneering case in which the ECJ articulated the notion of the European legal order as that of a Constitutional Charter based on the Rule of Law is one that centres on the power of judicial self-interpretation against external challenge. Asked to decide on the legality of a proposal for an overlapping free trade regime with a separate adjudicative organ, the ECJ in 1991 held that the Draft Agreement (later revised in a legally acceptable manner) on the formation of a European Economic Area (EEA) for some of the EU's geographically peripheral areas was impermissible to the extent that it threatened the integrity of the EU legal system, and in so doing also the predictable, calculable, comprehensive rule-governed ethos of the Rule of Law that underpinned it.[30]

Another, highly topical, example illustrates an even more forceful assertion of the Rule-of-Law based autonomy of the EU legal system against external forces. In the controversial and protracted *Kadi* litigation which has only recently reached the Court of Justice, the Advocate General has proposed setting aside the earlier judgment of the Court of First Instance[31] to the effect that a person suspected of terrorism could not challenge an assets freezing order passed by the Council in implementation of a binding UN Security Resolution.[32] The question here is not just one of self-interpretation – of the ECJ having the last word over the meaning of its own legal system. It is also a more basic one of integrity, of the very self-definition of the EU legal order *qua* autonomous legal order. In particular, the notion that the regional EU stands in a relationship of subordination to the global UN was rejected by the Advocate General, even with regard to 'exceptional' questions of terrorism and international security. Rather, the Court's "duty to preserve the rule of law"[33] means – to recall an earlier formulation – that it is bound to ensure that EU 'law rules'[34] in all matters falling under its jurisdiction. It follows that even where the EU is effectively acting as an implementing agent for another entity, as in the instant case,

[30] *Opinion 1/91(Draft Opinion on the EEA)* [1991] ECR I-6079. See further, Walker n14 above.
[31] Case T-315/01 *Kadi* v *Council and Commission* [2005] ECR II-3649.
[32] Case C-402/05, pending; Opinion of Advocate General Poiares Maduro delivered on 16 January 2008.
[33] *Ibid*., para. 45.
[34] Above n3.

such implementation has to respect all relevant aspects of the corpus of EU law, including these fundamental rights which are held to be part of the general principles of EU law. And since, of these fundamental rights, the contested regulation was held to infringe the right to be heard, the right to judicial review and the right to property; in the view of the Advocate General it should be annulled.

If we turn, now to the instrumental dimension, here the 'use-value' of the Rule of Law to the EU is just as central. Ever since its inception, many of the most prominent justifications of the EU have rested, implicitly or explicitly, on the instrumental capacity of a legal framework based on Rule of Law regulatory values to serve a broader polity-building rationale. In their very different ways, for instance, two of the most political influential of the early grand theories of integration, the ordoliberal tradition[35] and Hans Ipsen's idea of the EU as a special purpose association,[36] were supported by Rule of Law premises. For the ordoliberals, the Treaty of Rome supplied Europe with its own economic constitution, a supranational market–enhancing system of rights whose legitimacy depended on the absence of democratically responsive will formation and consequential pressure towards market-interfering socio-economic legislation at the supranational level, a matter which should instead be left to the Member States – and even there only insofar as compatible with the bedrock economic constitution. The ordoliberal theory, then, provides a classic case in which the Rule of Law, through ring-fencing and guaranteeing a sphere of private right and exchange, provides an instrumental platform for the efficient operation of a capitalist economic logic.

Ipsen's theory, to which Giandomenico Majone's contemporary work on the idea of a European "regulatory state"[37] is a notable successor, shares with ordoliberalism the idea that supranationalism should transcend partisan politics. Here, however, the invisible hand of the market is supplemented by the expert hand of the technocrat. The scope of European law is not restricted to negative integration – to the market-making removal of obstacles to wealth-enhancing free trade, but also extends to certain positive measures of an administrative nature. In Majone's elaborately developed model, these regulatory measures are concerned not with macro-politically sensitive questions of distribution, but with risk-regulation in matters such as product and environmental standards where expert knowledge is paramount, and where accountability is best served by administrative law measures aimed at transparency and enhanced participation in decision-making by interested and knowledgeable parties rather than the volatile preferences of broad representative institutions. Here, then, we have an

[35] See e.g. E-J Mestmacker, "On the Legitimacy of European Law" (1994) *RabelsZ* 615; see also D. Chalmers, "The Single Market: From Prima Donna to Journeyman" in Shaw and More (eds) *New Legal Dynamics of European Union* (Oxford: OUP, 1996) 55-72. On the continuities between the legal and political thought of the Weimar Republic and post-war thinking about supranationalism more generally, see C. Joerges and N.S. Ghaleigh (eds) *Darker Legacies of Law in Europe* (Oxford: Hart, 2003).

[36] H-P. Ipsen, "europaische Verfassung – Nationale Verfassung" (1987) EuR 195.

[37] G. Majone, "The Rise of the Regulatory State in Europe" (1994) *W.Eur.Pol* 77. On the connections between Ipsen and Majone, see C. Joerges "'Good Governance' in the European Internal Market: An Essay in Honour of Claus-Dieter Ehlermann" EUI Working Papers, RSC No. 2001/29.

example of an instrumentalism based upon the law's role as a procedural steering mechanism, and in particular its capacity to bring the predictable and comprehensive virtues of the Rule of Law to the task of reflecting and channelling the demands of highly varied contexts of decision-making within a polity.

Today, however, both the ordoliberal approach and the regulatory state approach are subject to increasing criticism for drawing an artificial distinction between technical questions of market-making and standard-setting and politically sensitive questions of resource and risk allocation.[38] Such a tension becomes all the more evident as the EU takes on a greater range of tasks whose effective performance involves the distribution of politically salient resources and risks and which reduces the capacity of states themselves to perform these tasks. The consequences of this for the instrumental value of the supranational Rule of Law are mixed. On the one hand, it has often proved to be a creative tension. The limitations of existing regulatory models have not deterred those 'proceduralists' who continue to hold that a distinctive characteristic of the EU is the extent to which its various sectoral policy horizons stand apart from one another in a decentred configuration and depend upon the contribution of special interest and epistemic communities, from seeking new and imaginative ways of combining interest-responsive input and expertly informed policy output.[39] On the other hand, the instrumental versatility of law in the EU is significantly limited by the broader political context. In particular, short of the development of a more robust system of general political representation at the European level organised around a stronger framework of parliamentary responsibility, and for all that both the ordoliberals and the advocates of a regulatory state approach have tried to make a virtue of this, Europe simply cannot offer the third main form of contemporary instrumental legitimation of law, namely as a transmission belt and crystallization of democratic opinion.

What of the Rule of Law's role in societal self-identification, in directly forging the bonds of social and political community? In this regard, the absence of a strong pre-existing pan-European cultural substratum and sense of common 'society' – an absence which operates in a mutually reinforcing relationship with the lack of a strong chain of political representation at the European-level – has been an important negative stimulus. The legislative innovations already discussed under the regulatory function of the Rule of Law are of significance here. In particular, the attempts to centre the Rule of Law as a solidarity-inspiring value under a Constitutional Treaty[40] much more self-consciously dedicated to the symbolic engagement of its putative citizens than any of its Treaty predecessors, marks

[38] See e.g. .A. Follesdal and S. Hix, "Why there is a democratic deficit in the EU: A Reply to Majone and Moravcsik" (2006) 44 *Journal of Common Market Studies* 533-562.

[39] See e.g. the work of Joerges on 'deliberative supranationalism'; e.g. "'Deliberative Supranationalism': Two Defences" (2002) 8 *ELJ* 133. See also the work of the democratic experimentalists on the Open Method of Co-ordination and other forms of "soft law"; e.g. J. Cohen and C. Sabel "Global Democracy" (2006) 37 *NYU Journal of International Law and Politics* 762; C.Sabel and J. Zeitlin "Learning from Difference: The New Architecture of Experimentalist Governance in the EU" *Eurogov* 07/02.

[40] See e.g. A. von Bogdandy, "The European Constitution and European Identity; text and subtext of the Treaty establishing a Constitution for Europe" (2005) 3 *ICON* 295-315.

a watershed. No longer is the cultivation of the Rule of Law just a means of legitimating 'the law' itself, and its personnel - as in the regulatory and authorisation functions, and no longer even just a means of legitimating other social and political ends that can be achieved through law – as in the instrumental function. Increasingly, the very idea of the Rule of Law as a *shared* idea is invoked to respond to a broader need of polity legitimation through the expressive medium of constitutionalism. Just as we have seen how the early ground-breaking Rule of Law jurisprudence of the ECJ explicitly sought to amplify the legitimacy of its claim by invoking the small 'c' word, the use of the "Big 'C'" documentary constitutional process took these symbolic politics a stage further.[41] The drafters of the Constitutional Treaty sought to send an even more powerful message, one which invested heavily – if ultimately unsuccessfully – both in the general community-building aspirations of the documentary constitutional process and in the strong historical association between the founding of a constitutional order and a commitment to the Rule of Law over arbitrary or absolutist rule.[42]

If we turn, finally, to the promotional dimension, probably the area of EU activity where the Rule of law figures in most explicit and active discursive terms is in the area of external relations.[43] The initial 1993 Copenhagen criteria governing the Central and East European wave of Enlargement (finally implemented in ten countries in 2004 and in the remaining two in 2007) included a stipulation that applicant states should respect the Rule of Law, anticipating its formal specification as a condition of membership in the 1997 Treaty of Amsterdam.[44] A similar approach is taken today to the EU's 'new' near-neighbours under the Stabilization and Association Process in the Western Balkans and the broader European Neighbourhood Policy (ENP).[45] Patently, given that external relations is the domain in which what distinguishes the Union can be placed in sharpest relief, the priority accorded to the Rule of Law here is not symbolically innocent. It has served to embellish the claim that adherence to the Rule of Law is an identifying criterion of the EU, even as the merits of such a policy are lauded in proselytizing and universalistic terms. Indeed, in this regard the insistence upon the Rule of Law is but one plank of an emerging platform of external self-presentation and self-identification based upon the notion of Europe as an uniquely "normative power",[46] relying upon example and civil persuasion rather than the military might or threat offered by other regional actors.

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[41] See e.g. N. Walker Big "C" or small "c"? " (2006) 12 *European Law Journal* 12-14.
[42] See e.g. G. Sartori, " Constitutionalism: a preliminary discussion" (1962) 56 *American Political Science Review* 853.
[43] For wide-ranging discussion, see M. Cremona (ed) *The Enlargement of the European Union* (Oxford: OUP, 2003).
[44] Art. 49 TEU.
[45] See *European Neighbourhood Policy*, European Commission 2004, 273. See also the European Security Strategy of the same period; *A Secure Europe in a Better World* European Council (2003). See more generally, M. Cremona, "The European Neighbourhood Policy: Partnership, Security and the Rule of law" in A. Mayhew and N. Copsey (eds) *European Neighbourhood Policy and Ukraine* (Sussex: European Institute, 2005) 25-54.
[46] See e.g. I. Manners, "Normative Power Europe: A Contradiction in Terms?" (2002) 40 *JCMS* 235-58; E. Johansson-Nogues, "The (Non) Normative Power EU and the European Neighbourhood Policy: An Exceptional Policy for an Exceptional Actor" (2007) 7 *European Journal of Political Economy* 181-194.

Clearly also, and as an extension of this approach, external relations provides a context within which the authorization and instrumental functions of the Rule of Law can be and have been amplified. As regards authorization, the importance accorded to legal institution-building as an earnest of commitment to the Rule of Law is a striking feature of the conditional strategies pursued in the country-specific Europe agreement leading to accession, and now, in the next generation, to the agreements under the Stabilization and Association Process and the broader European Neighbourhood Policy (ENP). In both contexts – accession and neighbourhood policy – we also see many examples of an explicit instrumental endorsement of the Rule of Law, through its stipulation as a necessary means to the end of the development of a market economy and a democratic political system.[47] One final, cumulative effect of this high-profile pursuit of the identifying, authorisation and instrumental dimensions of the Rule of Law in the theatre of foreign policy is to provide a check on internal policy. Over many years, especially in the area of the mainstreaming and institutional protection of human rights, the external Rule of Law profile of the EU has provide an ideological resource for EU policy-makers and critics alike wishing either to reinforce or to question the EU's internal commitment to making the 'law rule'.[48]

4. The Mixed Virtue of Necessity

In summary, therefore, we can see that the Rule of Law sounds powerfully and diversely within the EU's 'politics of law'. Its regulatory virtues are advertised increasingly prominently, and their pursuit is linked in a complex chain of cause and effect with the broader question of the authorization of the modalities, structures and personnel of law as a central feature in the making and preserving of the EU polity. Much of the prominence accorded to law, and to its Rule of Law pedigree, has also to do with the diverse and changing instrumental demands made of it, while with the recent 'constitutional turn', the Rule of Law has been auditioned for a new role as a direct component in the construction and legitimation of supranational political community. In addition, these dramas are more and more often played out on the external as well as the internal stage, and indeed the highest profile performance may be reserved for external audiences. Today it is as much through what the institutions of the EU say and does say when they are looking outwards as when they are looking inwards that the discourse and practice of the Rule of Law impacts on its identity politics.

Does this busy agenda demand too many things, and perhaps the wrong things, or incompatible things, of the Rule of Law? What is certainly true, and what is the focus of the concluding section of the essay, is that the Rule of Law suffers from a twofold vulnerability in these circumstances. In the

[47] See Cremona, above n45.
[48] For an influential early statement of this argument, see P. Alston and J. Weiler, "An "Ever Closer Union" in Search of a Human Rights Policy" in P. Alston (ed) *The EU and Human Rights* (Oxford: OUP, 1999).

first place, as already briefly intimated, the centrality and diversity of contribution of the Rule of Law to the EU polity-in-the-making is to some extent a function of the weakness of other traditional media of common community – both political and cultural – at the supranational level. In the second place, and exacerbating the first difficulty, because the Rule of Law's own efficacy and legitimacy in some measure depends upon the kind of fertile environment in which these other media thrive, then just where more is demanded of it, it may in fact be less well placed to deliver.[49] This, in a nutshell, is what we mean by necessity's mixed virtue. The more indispensable the Rule of Law becomes to certain tasks, the more inadequately equipped it can appear. We can illustrate that conclusion, and the two themes that point towards it, by once again briefly reviewing the five dimensions of use-value.

To start with the core regulatory and authorization functions of the Rule of Law, the difficulty with the championing of the Rule of Law as an unqualified virtue of the EU is that any such claim is bound to be compromised and exposed by the inevitable gaps in the symbiotic relationship between the two. Indeed, as a negative image of the symbiotic relationship, to the extent that the two functions do not operate in mutual support we may observe a kind of double exposure. In the first place, in an environment in which the law lacks a deep reservoir of indigenous social and political support, the legal system's attempts at self-authorization inevitably struggle against external challenge. In the second place, to the extent that the legal system is only partially successful in meeting that challenge, this reduces its capacity to achieve the regulatory virtues of the Rule of Law, so further undermining its legitimacy. Simply put, the self-projection of the EU legal order as a self-contained legal system, with all the developed attributes listed earlier, cannot gainsay the fact that, given its vast area of overlap with 'primary' national legal orders, it stands in a difficult and sometimes contentious relationship with these national legal orders, and this difficult and contentious relationship inevitably sullies the 'perfection' of its Rule of Law claims.

For example, as regards self-definition and the closely allied properties of self-extension and self-interpretation, for all the recent juridical successes of the EU when pitted against other transnational entities such as the UN which also lack indigenous social and political support, the scope – indeed even the existence – of its autonomy-endorsing principle of supremacy remains disputed in at least some national constitutional settings (and in some national courts) where such indigenous support remains relatively strong.[50] What is more, this trend has been exacerbated by Enlargement and by the

[49] See e.g. N. Walker, "Legal Theory and the European Union: A 25th Anniversary Essay" (2005) 25 *OJLS* 581-601, esp. at 590; M. Everson, "Is it just me, or is there an Elephant in the Room?" (2007) 13 *European Law Journal* 136-145.

[50] See e.g. N. Walker, "Late Sovereignty in the European Union" in N. Walker (ed) *Sovereignty in Transition* (Oxford: Hart, 2003) 3-30.

historical fears of sovereignty loss on the part of some of the ex-Warsaw Pact accession states.[51] Equally, the EU's claim to comprehensive and internally coherent self-ordering is vulnerable to the existence of extensive 'grey zones', where either the basic competence of the EU or its possession of binding legal instruments is curtailed or qualified due to national resistance, and where EU measures are affected accordingly. This, indeed, is one key criticism of the recent turn to the typically 'soft law' methodologies of the Open Method of Co-ordination in those areas of social policy where national competence has only been reluctantly conceded.[52] As regards self-enforcement, the EU legal order remains heavily reliant on the uneven commitment of national courts, and other national political actors, to the application of its norms, and to their uneven willingness to pursue and enforce sanctions in the case of breach.[53] And as regards self-discipline, notwithstanding the heroic promise of *Les Verts*, the EU is still far from offering a complete system of institutional accountability in the courts. For all the advances of the Constitutional Treaty, substantially retained in the Treaty of Lisbon, in extending the range of bodies whose acts are reviewable by the Court,[54] and in applying jurisdiction more comprehensively in the old 'third pillar' of Justice and Home Affairs,[55] gaps remain. In particular, in the old 'second pillar' of Foreign and Security Policy the jurisdiction of the European Courts to supervise the acts of EU organs is still almost non-existent.[56]

If we turn to the instrumental dimension of the Rule of Law's claim to centrality, it has already been remarked how diversely articulated and deeply contested that is across the different visions of European integration. Market-making and optimal regulation of risk distribution across various policy

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[51] On recent challenges to the supremacy of EU law in the courts of new Member States, see e.g. W. Sadurski "Solange, Chapter 3: Constitutional Courts in Central Europe – Democracy – European Union" (2008) 14 *ELJ* 1-35.

[52] See e.g. C. Joerges (2007) "How the Rule of law Might Survive the European Turn to Governance", Unpublished Paper, NEWGOV Conference, Florence, 31st May 2007. But see e.g. N. Walker and G. De Burca, "Reconceiving Law and New Governance" (2007) 13 *Columbia Jnl. of European Law* 519-537.

[53] This is a vast topic, covering a range of controversial issues from the willingness of national courts to make preliminary references, to doctrines of effective and equivalent (to domestic law) protection of EU law in national courts, to principles of state liability, to enforcement actions against member states. Each of these areas is in a state of constant judicial and legislative flux, which is inevitable given the dependence of EU law on national systems of application and enforcement on the one hand, and the jealousy of member states of the procedural autonomy of their legal systems on the other – a jealousy which can also be defended on Rule of Law grounds! To take but one example, the controversy surrounding the *Köbler* line of cases, in which the ECJ moved to extend the principle of state liability to mistaken judicial decisions in national courts of last instance may be defended at the European level as a vital link in the chain ensuring the integrity of European law, while it may be attacked at the national level as violating the principle of national legal certainty and interpretive autonomy. See Case C-224/01 *Köbler* v *Austria* [2003] ECRI-10239.

[54] In particular, acts of the European Council are now reviewable by the ECJ, while the European Council, European Central Bank and other 'bodies, offices and agencies" can now be the subject of proceedings for failure to act. See Arts 230 and 232 EC, modified and replaced by the equivalent provisions of the new Treaty on the Functioning of the European Union (TFEU).

[55] Although the ECJ remains excluded from reviewing the validity or proportionality of law-enforcement operations or the exercise of other responsibilities incumbent upon Member States with regard to the maintenance of law and order and safeguarding of internal security. See Art 240b TFEU.

[56] With the exception, introduced by the Treaty of Lisbon, of the power to monitor the legality of restrictive measures against natural or legal persons – presumably in the field of anti-terrorism; Art. 240a TFEU. For an earlier critique of the shallowness of the EU's Rule of Law claims in this regard, see B. de Witte, "The Nice Declaration: Time for a Constitutional Treaty of the European Union?" (2001) 36 *International Spectator* 21-30, 22.

spheres answerable to widely diverse functional and territorial interests remain the two basic but disputed grand polity ends to which the Rule of Law – through ring-fencing property rights on the one hand and providing responsive and contextually adequate decision-making procedures on the other – is the arguable means. But the absence of the institutional and cultural supports for the kind of strong democratic mandate familiar to states continues to militate against the emergence of a third and arguably historically more stable instrumentally-grounded basis for the Rule of Law, and one which might reinforce its capacity to perform these other instrumental objectives – namely the service of the majoritarian democratic will. Again then, for the very reasons that the EU Rule of Law is required to be strong – to provide a stable bulwark against ongoing disputation of the terms and limits of national and supranational encroachment upon market freedoms and to track and reconcile the complex diversity of its multipolar constituency and 'open-ended'[57] mandate – it threatens to be weak.

A similar story can be told of the putative identifying function of the Rule of Law. Here, as already noted, the legitimizing role of the Rule of Law is stretched further than ever before. Here the 'necessity' of the absence of other legitimating media requires that the Rule of Law not only be invoked to legitimate the law itself or other ends to which it may make an instrumental contribution, but that it present itself, as it has most recently in the context of the documentary constitutional debate, as a direct constituent of a broader claim to the EU's own general polity legitimacy. Of course, some would contend that the EU is in need of no such holistically understood and collectively endorsed claim to legitimacy,[58] and that sceptical claim is closely linked to the strong continuing attachment to the models of disaggregated 'output' justification of the EU based on market and regulatory benefits we have already discussed. But the very occurrence of the documentary constitutional debate, and its acrimonious failure, is arguably the best evidence of the continuing existence and urgency of a collectively recognised polity legitimacy deficit.[59] Moreover, absence of polity legitimacy is not just a question of political morality – of the lack of a shared sense of justification of a polity which has evolved well beyond any initial conception, or even of the urgency of the immediate symptoms of widespread social unease which manifested themselves in the referendum 'no' votes in France and the Netherlands.[60] It also has debilitating long-term consequences. For as has often been observed, a political entity insufficiently trusted by its members either with the formal competence or the practical capacity to resolve collective action problems that, partly on account of its own earlier development, lie

[57] See e.g. M. Maduro, Where to Look for Legitimacy?" in E.O. Eriksen, J.E. Fossum and A.J. Menendez (eds.) *Constitution Making and Democratic Legitimacy* (Oslo: Arena, 2002) ARENA Report No.5/2002. 81.
[58] See e.g. A. Moravcsik, "What can we learn from the collapse of the European constitutional project?" (2006) 47 *Politische Vierteilahresschrift* 219-241.
[59] See e.g. N. Walker, 'After fi nalité' The Future of the European Constitutional Idea' in G. Amato, H. Bribosia and B. de Witte (eds), *Genèse et destinée de la Constitution européenne* (Brussels: Bruylant, 2007) 1245-1270.
[60] See e.g. M. Qvortrup "The Three Referendums on the European Constitution Treaty" (2006) 77 *The Political Quarterly* 89-97.

increasingly beyond the steering capacity of the individual states, is likely to face a "growing problem solving gap"[61]

Yet the Rule of Law appears poorly suited to any such ambitious project of polity legitimacy. On the one hand, it seems too 'thin'. It is, to recall, a virtue that is often – and indeed quite persuasively, presented in universalistic rather than community-particular terms, a tendency increasingly evident in the EU's own external relations. On the other hand, it can quickly become too 'thick' – a virtue that divides rather than unites. We noted at the outset that the Rule of Law in a practical regulatory sense can only thrive if obtains direct support from the immanent culture, and this cultural sensitivity is closely reflected in the nuances of its adaptation across different national environments. Indeed, once we appreciate this, it appears somewhat ironic that those seeking an alternative to a prior sense of common culture as a bonding ingredient in the making of political community would look to such a strongly culturally-inflected concept. So, for example, we find that the very English language term 'Rule of Law' is only poorly translated into the venerable German term *Rechtstaat* or the more recent French term *Etat de Droit*. In both latter cases the sense of the relevant term betrays the absence of a common law tradition and the more prominent and proactive role of the state in the development of modern legal order in continental Europe, with the German term more accurately translated as 'state rule through law'[62] and the French term as 'constitutional state as legal guarantor of fundamental rights'.[63]

Quite apart from these differences, moreover, there is the discursively explicit 'statist' legacy to consider. There is something deeply incongruous in reading in Article 6 of the Treaty on European Union, or its equivalent in the new Treaty of Lisbon, that a polity *other than a state*, namely the EU, is founded on values that address the state, or rather the *Staat or état* as their very genitive – as their anchor of reference. At best, this is to treat the legitimating foundations of the EU in secondary and borrowed terms. At worst, it feeds the sceptical suspicion that even to think of the political identity of the non-state EU in legal-constitutional terms may be a "category error".[64]

But none of this is to deny that necessity can indeed be a virtue as well as a vice. The Rule of Law is anything but redundant at the supranational level. At the very least, its core regulatory function remains vital, even if it is far from perfectly realised, and even if the fact that the EU is a secondary and "relational"[65] legal order – in some measure both dependent upon and in marginal competition with state legal orders, means that it will always struggle to achieve the authoritative credentials necessary for

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[61] F. Scharpf, "Problem Solving Effectiveness and Democratic Accountability in the EU", (2003) *Max Planck Working Papers* 03/01.
[62] Rosenfeld, above n4, 1319.
[63] Rosenfeld, above n4, 1330, where he also suggests that the best French equivalent for *Rechtstaat* is *Etat Légal*.
[64] A. Moravcsik, "A Category Error" *Prospect,* July 2006, 22-26 at 25.
[65] Walker, above n14.

a fuller realization of these regulatory virtues. But it is also the case that the restless activity and debate that surrounds the other use-values of the Rule of Law need not simply be reduced to and pilloried as the 'overreaching' and 'stretching out of shape' of an 'old' concept' forced to attempt 'new' tricks. In particular, its location in a supranational documentary constitutional frame need not be terminally dismissed as the desperate attempt to wish into being a sense of European solidarity around the Rule of Law and associated values simply through the written word – through the "vindication" [66] of the *status quo ante* supposedly performed by the simple adhesion of a glossy new constitutional label, with all else staying the same.

For, in conclusion, this misconceived, or at least easily overstated identifying function does not exhaust the potential of the coupling of the constitutional idea and the Rule of Law in the supranational domain. Instead, the supranational 'constitutional turn' – indeed, provided the time, place and generative process are adequate, a renewed *documentary* constitutional turn – can also be seen as a special vehicle for the Rule of Law's 'procedural turn'. Proceduralism in the medium of constitutionalism need not be viewed as a background reliance on legality as a means sufficient and appropriate to design and authorise a directly representative method of democratic legislation, as has been its role in many national constitutional settlements but as is not feasible in the supranational context. Neither, however, need it be viewed merely as an investment in a second-best alternative to a directly representative method of democratic legislation and a one-off compensation for its absence – an impression difficult to avoid given the historical association of the EU with a 'democratic deficit' and one which again may have contributed to the referendum 'no' votes. As an alternative to either of these instrumental agendas, if sufficiently open in consultation, intensive in consideration, ambitious in scale and depth, and iterative in response to changing circumstances, a Rule-of Law grounded procedural constitutionalism may instead be seen as the platform for a post-representative conception of democracy; an attempt to lay down and adapt as necessary the rules of the political game in a manner that is both democratically mandated and, cognisant of the reduced currency of representative democracy in the conduct of that game, productive of appropriately democratically-sensitive alternatives.[67]

In this way, a renewed constitutional process at the supranational level may provide a limiting test of the instrumental capacity of the Rule of Law, viewed as a 'solution-concept',[68] to negotiate the problem of its social dependence in a boot-strappingly creative fashion. Whether and to what extent it

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[66] See e.g. N. Walker "Europe's Constitutional Momentum and the Search for Polity Legitimacy" (2005) 4 *International Journal of Constitutional Law* 211-238.

[67] See e.g. S. Benhabib's discussion of "democratic iteration" – the capacity of the democratic idea to find new functionally equivalent post-representative institutional forms crafted around participation on the basis of inclusive mechanisms of constituency recognition, diverse forums of interest negotiation and deliberation, multiple forms of accountability, etc, in R. Post (ed) *Another Cosmopolitanism* (Cambridge: Harvard University Press, 2006).

[68] Waldron, above n1, 158.

succeeds will depend on its procedurally creative, circle-breaking capacity to steer putative members towards the fair and appropriate terms of decision-making for a 'polity' which will not obtain general endorsement from these putative members *as* a self-standing polity – a political community *capable* of legitimation through its own just and appropriate terms of decision-making – unless and until just such fair and appropriate terms are found and settled. In the final analysis, then, the Rule of Law may indeed find a role to play in addressing the problem of supranational polity legitimacy holistically understood – as one of shared commitment and attachment. But it can only hope to perform that role productively if it is offered in modesty – as a common means, rather than reified as a common end.